

Courtney Jayne v.  
City of Sioux Falls

Don Kearney  
February 21, 2019

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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

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COURTNEY JAYNE, Individually and  
as Personal Representative of the  
ESTATE of M.Z.,

Plaintiff,

vs. Case No. 4:18-CV-4088-KES

CITY OF SIOUX FALLS,

Defendant.

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Videotaped Deposition of: DON KEARNEY  
Date: February 21, 2019  
Time: 2:03 p.m.

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APPEARANCES

Mr. Anthony J. Schrank  
Robins Kaplan, LLP  
Minneapolis, Minnesota

Attorney for the Plaintiff

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APPEARANCES: (Continued)

Mr. James E. Moore  
Woods, Fuller Shultz & Smith, P.C.  
Sioux Falls, South Dakota

and

Ms. Karen A. Leonard  
Sioux Falls City Attorney's Office  
Sioux Falls, South Dakota

Attorneys for the Defendant

REPORTED BY: Audrey M. Barbush, RPR

VIDEOGRAPHER: Jason Davis, Starhaven Films

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S T I P U L A T I O N

It is hereby stipulated and agreed by and between the  
above-named parties through their attorneys of record, whose  
appearances have been hereinabove noted, that the videotaped  
deposition of DON KEARNEY may be taken at this time and  
place, that is, at the offices of Woods, Fuller, Shultz &  
Smith, P.C., 300 South Phillips Avenue, Suite 300,  
Sioux Falls, South Dakota, on the 21st day of February,  
2019, commencing at the hour of 2:03 p.m.; said deposition  
taken before Audrey M. Barbush, a Registered Professional  
Reporter and Notary Public within and for the State of South  
Dakota. Objections, except as to the form of the question,  
are reserved until the time of trial. Insofar as counsel  
are concerned, the reading and signing of the transcript by  
the witness is waived.

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| <p style="text-align: right;">Page 29</p> <p>1 bridge was full of white bubbles. Witnesses stated</p> <p>2 that a young male was playing in the bubbles and</p> <p>3 appeared to fall off an unseen ledge."</p> <p>4 I read that correct, true?</p> <p>5 A True.</p> <p>6 Q So when you reviewed this incident, did you know</p> <p>7 whether or not the little boy fell off of an unseen</p> <p>8 ledge?</p> <p>9 A At the time, I did. I just didn't remember it.</p> <p>10 Q Is an unseen ledge a hazard the City wants to exist?</p> <p>11 A Could you repeat that, please.</p> <p>12 Q Sure. Is foam buildup that is so great that it hides</p> <p>13 rock ledges -- is that a hazard?</p> <p>14 A Yes.</p> <p>15 Q The City knew about this hazard in 2013 because of the</p> <p>16 incident in 2013, true?</p> <p>17 A We didn't identify it as a hazard.</p> <p>18 Q Why not?</p> <p>19 A We didn't identify that as something that we felt</p> <p>20 needed corrective action.</p> <p>21 Q The foam has built up for years, true?</p> <p>22 A Periodically, yes.</p> <p>23 Q It builds up in such a great height that it exceeds the</p> <p>24 rock ledge, true, at times?</p> <p>25 A I believe it can, yes.</p>   | <p style="text-align: right;">Page 31</p> <p>1 BY MR. SCHRANK:</p> <p>2 Q So you read this police report, and you knew at the</p> <p>3 time -- now you remember knowing at the time that this</p> <p>4 little boy fell off an unseen ledge and that ledge was</p> <p>5 not seen because of great buildups of foam, yet you,</p> <p>6 nor the City, ever addressed the fact that this foam</p> <p>7 buildup hides the river edge?</p> <p>8 A Yeah, we did not identify that as a hazard.</p> <p>9 Q You identified slippery rocks as a hazard in 2013,</p> <p>10 true?</p> <p>11 A We did.</p> <p>12 Q Did slippery rocks have anything to do with the 2013</p> <p>13 drowning?</p> <p>14 A I don't know.</p> <p>15 Q The City identified that parents should supervise</p> <p>16 children in 2013, and that's why they put it on the</p> <p>17 warning signs, true?</p> <p>18 A Yes.</p> <p>19 Q Yet instead of notifying the public that there's going</p> <p>20 to be an unseen ledge where you can fall into the river</p> <p>21 due to this great amount of foam -- you don't warn them</p> <p>22 of that, but you warn them that they should supervise</p> <p>23 their children?</p> <p>24 A We did not -- can you say that -- ask that question</p> <p>25 again?</p>   |
| <p style="text-align: right;">Page 30</p> <p>1 Q This wasn't an instance in 2013 that it's never</p> <p>2 happened before where it's gotten this big, true?</p> <p>3 A I don't know.</p> <p>4 Q Did you have any reason to believe that in 2013 the</p> <p>5 foam would not have reached these heights again?</p> <p>6 A Could you repeat that?</p> <p>7 Q Did you have any reason to believe in 2013 that the</p> <p>8 foam would not reach these heights again in the area</p> <p>9 where the 2013 drowning happened?</p> <p>10 A I didn't have any reason to believe that.</p> <p>11 Q In fact, it did reach great heights again because an</p> <p>12 incident happened in 2018 where my client's daughter</p> <p>13 drowned, true?</p> <p>14 A True.</p> <p>15 Q And foam was a factor in both of those drownings, the</p> <p>16 2018 and 2013 drowning, true?</p> <p>17 A Yes.</p> <p>18 Q Why didn't the City identify the fact that this foam</p> <p>19 builds up so large that it creates an unseen ledge</p> <p>20 leading to a fall into a river?</p> <p>21 A When we reviewed the incident, we didn't identify that</p> <p>22 as a hazard.</p> <p>23 Q But clearly it was, true?</p> <p>24 MR. MOORE: Object to form.</p> <p>25 MR. SCHRANK: It's okay. You've already said it.</p> | <p style="text-align: right;">Page 32</p> <p>1 Q Sure. You warn the guests at Falls Park to supervise</p> <p>2 their children, after the 2013 incident, true?</p> <p>3 A Correct.</p> <p>4 Q But you don't warn them that the foam is going to build</p> <p>5 up so great that it's going to create an unseen ledge</p> <p>6 that your child's going to fall off into and die in the</p> <p>7 river?</p> <p>8 A We did not warn that.</p> <p>9 Q Isn't that something that the public needs to know?</p> <p>10 A In our review of the situation, we did not identify</p> <p>11 that as something that we felt like was a hazard and</p> <p>12 should be placed on a sign or shared with the</p> <p>13 community.</p> <p>14 Q But turbulent water and supervise children does go on</p> <p>15 the sign?</p> <p>16 A Correct.</p> <p>17 Q Why did those things go on the sign and not the fact</p> <p>18 that there's this hidden danger that your kid's going</p> <p>19 to fall off a ledge because the bubbles are so great?</p> <p>20 A It didn't occur to us at the time that -- or the</p> <p>21 individuals that were reviewing the incident.</p> <p>22 Q You were one of the ones that reviewed this incident,</p> <p>23 and you read the police report that says the boy was</p> <p>24 playing in the bubbles and appeared to fall off an</p> <p>25 unseen ledge. How did that go forgotten?</p> |

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| <p style="text-align: right;">Page 41</p> <p>1 A Mike Hall, I believe, led the process to coordinate<br/>2 discussions with the various City representatives and<br/>3 was involved in compiling the information that went<br/>4 into this document.<br/>5 Q Looking at the second page of this document, CITY 593,<br/>6 the very last sentence on that page says "The foam can,<br/>7 'hide' portions of the Falls' rock formations and can<br/>8 create an attraction for visitors, drawing them even<br/>9 closer to the water."<br/>10 It reads that, true?<br/>11 A Correct.<br/>12 Q Who provided that information?<br/>13 A I believe the team that worked on this report.<br/>14 Q So you don't know specifically who provided that<br/>15 information?<br/>16 A Correct.<br/>17 Q Do you agree or disagree that the foam can create an<br/>18 attraction for visitors, drawing them even closer to<br/>19 the water?<br/>20 A Yes.<br/>21 Q You agree that the foam can create an attraction for<br/>22 visitors, drawing them even closer to the water?<br/>23 A Yes.<br/>24 Q Are you just coming to that conclusion now as we sit<br/>25 here today, or is that something that you knew back in</p>   | <p style="text-align: right;">Page 43</p> <p>1 the tendency to get inundated with floodwaters.<br/>2 Q Right. Because when that happens, then you'd use the<br/>3 orange temporary barricades to close off those areas,<br/>4 true?<br/>5 A Correct.<br/>6 Q Who is it that monitors the river levels?<br/>7 A Our risk manager, along with our parks and recreation<br/>8 department staff monitor that and have communication<br/>9 around that.<br/>10 Q Do you know if there's any way that that group can<br/>11 monitor the foam level?<br/>12 A Yeah, I believe they can.<br/>13 Q How do you know that they can do that? How do you<br/>14 believe that they can do that?<br/>15 A Through visual observation.<br/>16 Q Is that how they monitor the turbulence as well?<br/>17 A We don't monitor the turbulence.<br/>18 Q I'm sorry. You're absolutely correct. Is that how<br/>19 they monitor the water level as well?<br/>20 A Yes.<br/>21 Q Has Falls Park ever closed -- has the City ever closed<br/>22 Falls Park because the foam level was too high?<br/>23 A No.<br/>24 Q So the hazards that were identified at Falls Park<br/>25 before March 18, 2018, relative to the Falls were</p> |
| <p style="text-align: right;">Page 42</p> <p>1 2013 after you reviewed the incident where a little boy<br/>2 was playing with white bubbles and fell into the river?<br/>3 A After the incident.<br/>4 Q After the 2013 incident.<br/>5 A The 2018 incident.<br/>6 Q Do you know anything about the turbulence of the water<br/>7 in different areas of Falls Park?<br/>8 A I generally know, yes.<br/>9 Q What areas are the most turbulent?<br/>10 A The areas most turbulent really kind of depend on how<br/>11 much water is coming down the river at the time, and so<br/>12 areas of the upper falls can be very turbulent, the<br/>13 entire river can be turbulent. In lower flows, the<br/>14 areas below the Falls can be turbulent, and the low<br/>15 head dam can be turbulent as well.<br/>16 Q Is there any person or committee that evaluates the<br/>17 turbulence of the water in a given year to say, hey,<br/>18 this is going to be the more at-risk area versus this<br/>19 one up here?<br/>20 A Not specifically as it relates to turbulence.<br/>21 Q What are you thinking of that they do discuss that<br/>22 difference in the river?<br/>23 A One of the things that we monitor is river levels and<br/>24 at which point, if it gets high enough, we do monitor<br/>25 that, knowing that we have viewing platforms that have</p> | <p style="text-align: right;">Page 44</p> <p>1 slippery rocks, turbulent water, foam. Was there<br/>2 anything else?<br/>3 A Foam was not one of them.<br/>4 Q In 2013, you knew that foam was a factor in causing the<br/>5 death of two people, true?<br/>6 MR. MOORE: I'll object to form.<br/>7 THE WITNESS: I believe the boy was attracted to<br/>8 foam.<br/>9 BY MR. SCHRANK:<br/>10 Q Attracting a boy to an area where they could fall over<br/>11 an unseen ledge isn't a hazard in the eyes of the City?<br/>12 A At the time we didn't -- did not identify that as a<br/>13 hazard.<br/>14 Q Was the fact that there was an unseen ledge a hazard?<br/>15 MR. MOORE: Object to form, asked and answered.<br/>16 BY MR. SCHRANK:<br/>17 Q Was the fact that there was an unseen ledge a hazard in<br/>18 2013?<br/>19 A Could you repeat the question, please.<br/>20 Q Was the fact that there was an unseen ledge a hazard --<br/>21 an identified hazard in the 2013 drownings?<br/>22 A Yes.<br/>23 Q So other than slippery rocks -- strike that.<br/>24 And that unseen ledge was unseen because of the<br/>25 foam, true?</p>   |